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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Index #: 1:16-cv-0729-JFK

NAXOS ART INC.,

PLAINTIFF,

- against -

NICHOLAS S. ZOULLAS,

DEFENDANT(S).

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DECLARATION OF THOMAS A. FARINELLA IN OPPOSITION OF PLAINTIFF'S APPLICATION FOR COSTS AND ATTORNEYS' FEES

I, THOMAS A. FARINELLA, declare under the penalty of perjury that the following facts are true and correct:

1. I am attorney for plaintiff, and as such, am fully familiar with the facts and circumstances of this action as revealed to me.

2. On September 17, 2016, Defendant, Nicholas S. Zoullas ("Zoullas") filed a notice of removal from the Supreme Court, County of New York, Index Number 653223/2016. The good faith basis for the Removal petition was to consolidate the state court claim with the new federal case that was commenced on September 15, 2016.

3. On September 18, 2016, Zoullas filed an Amended Notice of Removal because the Exhibits did not appear on the initial filing. This was inadvertent and counsel for Zoullas discussed the filing error with the ECF clerk on September 19, 2016 in which the deficient filing was to be corrected. A subsequent Amended Petition was filed on September 21, 2016 because the ECF clerk instructed that it needed to be corrected.

4. On September 19, 2016, my colleague, Rannylin S. Dalley and I, traveled to Florida where we were joined by our client, Mr. Zoullas the next day for the purpose of filing a criminal complaint against Stacy Cliett and Todd Stephens for stealing a significant portion of the art work, that was subject of the underlying action.

5. On September 20, 2016, plaintiff's counsel wrote a letter to Judge Swain stating, "We write this letter on an emergency basis because Remand is urgent…If action is not taken against him immediately for his misconduct, it is very likely that he or the art will disappear entirely, if that has not already occurred. We therefore respectfully request an expedited ruling so that the state court contempt hearing scheduled for this Thursday, September 22, 2016, can proceed as scheduled."

6. On September 20, 2016, my colleague and I conferred with counsel for Plaintiff and explained that we would consent to the Remand back to state court. We needed to discussed it with our client and we needed to adjourn the state court contempt hearing because we were in Florida recovering the art work subject to this litigation. My colleague and I asked counsel for Plaintiff if we could reconvene the conference at 2:30 p.m. on September 21, 2016. We communicated that we were inclined to withdraw the petition for removal pending client's approval. They demanded we speak by 9:30 a.m. the next morning.

7. On September 20, 2016 at approximately 1:12 p.m. my colleague and I accompanied Mr. Zoullas to the Lantana Police Department to file a criminal complaint against Stacy Cliett and Todd Stephens for the art work that was stolen from him. Please see attached the police report as **Exhibit A**.

8. On September 21, 2016, at 12:48 p.m. Judge Ostranger's principal law clerk sent an email adjourning the Contempt hearing and stated that if the case was Remanded back to the Supreme Court a contempt hearing would be scheduled no later than 72 hours after remand.

9. On September 21, 2016, an Amended Notice of Removal was filed because the jurisdictional basis, we believed, in good faith, was accidentally omitted. Despite this Amended Removal petition and the likelihood it was going to be withdrawn the filing was made to ensure the record was accurate.

10. Despite the likelihood our agreement to withdraw the Removal petition and after the Supreme Court matter was adjourned Plaintiff's counsel filed the emergency application. In his declaration counsel stated, "At this time, Naxos does not know where its 210 works of art are located.....[the Removal petition] will only serve to give him additional time to further transfer and secret Naxos' valuable works of art so that they become unrecoverable. Accordingly, immediate relief is needed to avoid significant additional prejudice to Naxos." The posture that Plaintiff's counsel took did nothing more than undermine the effort in Florida to recover the art work.

11. My colleague and I communicated to Plaintiff's counsel for Naxos that we were in Florida with Mr. Zoullas, filing a criminal complaint before they filed the underlying motion in this matter.

Rather than assist in ensuring that the art work in Florida was preserved[1] Plaintiff's counsel dismissed our efforts by filing this motion in which he failed to mention that we were in Florida, with Mr. Zoullas attempting to recover the art work in his declaration. The assertions in Plaintiff counsel's sworn declaration are patently misleading because there was no emergency, the contempt hearing had been adjourned, he was aware that the Defendant was in Florida with counsel actively pursuing the art work specifically to avoid contempt, the art work was being recovered and defense counsel had anticipated withdrawing the removal petition.

Good Faith Belief Removal Was Proper Under 28 U.S.C. § §1332 and 1446

12. Defendant believed he was moving in good faith, according to 28 U.S.C. § 1446(b)(3), because "if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."

13. First, Defendant believed removal was justified because this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332, because there is complete diversity among the parties. Second, the presence of New York Defendants did not defeat diversity because they were not "properly joined and served as defendant" in the State Action pursuant to 28 U.S.C. § 1441(b)(2).

A. Defendant Believed this Court had diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332

14. 28 U.S.C. § 1332(a) provides that this Court has original jurisdiction over any matter where "the matter in controversy exceeds the sum or value of $75,000" and the matter is between

[1] Judge Ostranger's order dated September 15, 2016, entered on September 22, 2016 specifically stated that, "nothing is stopping the Plaintiff from taking action in Florida as well."

"citizens of different States and in which citizens or subjects of a foreign state are additional parties."

15. Defendant reasonably believed that complete diversity began when the Plaintiff filed his motion for contempt and existed at the time of the filing of this removal petition. Conceivably, if every piece of art work was turned over there would be no damages. It was not until Defendant attempted to recover the Florida art and the motion for contempt was filed that specific damages could be possible.

16. Plaintiff, Naxos Art Inc., is the owner of a company that is incorporated in the Isle of Man with Headquarters in the State of Minnesota.

17. Defendant, Nicholas S. Zoullas, is a citizen of the state of New York. Defendant Sophocles Zoullas, a New York resident, Stacy Cliett and Todd Stephens, both are residents of Florida, all of which have not been joined as necessary parties to the action.

18. Defendant believed there was diversity of citizenship among the parties as required by 28 U.S.C. §§ 1332. The amount in controversy exceeded $75,000 as the Plaintiffs' request to fine Zoullas $10,000 per day and for damages in his motion for contempt if it were granted will amount to $170,000.00 at the time of the filing for removal.

B. Removal was believed to be proper because Plaintiff has not properly joined and served all of the Defendants who reside in New York

19. Defendant formed a good faith belief that removal of the State Action was proper because none of the "parties in interest ***have not been properly joined and served*** as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b)(2) (emphasis added).

20. At the time, multiple Defendants had not been properly joined and served with the summons and complaint in the State Action including Sophocles Zoullas, a New York resident, Stacy Cliett and Todd Stephens, both are residents of Florida.

21. Because not all of the Defendants who resided in New York had been "properly joined and served," section 1441(b)(2) Defendant believed it did not bar removal of this Action on the basis that certain of the defendants are citizens of New York.

Timeliness of Petition for Removal

22. The Petition for Removal was believed to be timely pursuant to 28 U.S.C. §§ 1446 (b)(3) and (c)(1), as it was believed that the removal petition had been filed less than 30 days after Defendant could ascertain that federal jurisdiction existed which was triggered by the damages plaintiff requested in their contempt motion and that the removal petition was filed less than 1 year after commencement of the action; therefore, it was believed that the time to file for removal had not elapsed.

23. Defendant requested that this matter be removed to the United States District Court for the Southern District of New York for all further dispositions, that this case be consolidated with Nicholas S. Zoullas v. Stacy Cliett et al. Docket Number: 16-cv-7164 and that this Court issue such further orders and processes as may be necessary to bring before it all parties for ultimate resolution of this matter.

Defendant Had A Good Faith Belief that Compliance with All Requirements for Removal were Satisfied

24. Defendant believed he complied with all requirements for removal under Title 28 of the United States Code. A true and accurate copy of the Petition for Removal was filed with the Clerk of the Supreme Court of New York, County of New York, and to all adverse parties, in accordance with 28 U.S.C. § 1446(c).

Attorneys' Fees are not Appropriate

25. Mr. Zoullas had an objectively reasonable basis for removing this action and like in John

Wiley Sons, Inc. v. Glass (S.D.N.Y. 5-6-2010), 10 Civ. 598 (PKC). (S.D.N.Y. May. 6, 2010), he failed to meet the burden of establishing jurisdiction. While Plaintiff has made ostentatious allegations regarding the genuineness of the Removal application the facts of what happened in Florida on September 20, 2016 are undisputable and completely contradict the veracity of Plaintiff counsel's baseless allegation in his declaration.

26. Mr. Zoullas filed a criminal complaint against Stacy Cliett and Todd Stephens. Please see annexed hereto the evidence logs from the Lantana Police Department as **Exhibit B.**

27. The filing of Mr. Zoullas's criminal complaint led to the recovery of over one hundred and ten works of art which is more than fifty percent of the outstanding collection at the time of which is valued in excess of 2.6 million dollars. At present, Plaintiff has recovered more than eighty percent of the artwork at issue as there are still missing pieces from Lantana Florida. The recovery effort was extremely costly for Defendant as the actions of Cliett and Stephens resulted in thousands of dollars in damages. Please see annexed a list if the recovered art work on September 25, 2016 as **Exhibit C.**

28. In the case of Wiley Sons Inc., "Wiley requested its costs, expenses and attorneys' fees incurred in moving for remand. "An order remanding [a] case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005). Glass had an objectively reasonable basis for removing this action, she merely failed to meet her burden of establishing jurisdiction. Therefore, sanctions are unwarranted.

29. The enormous recovery effort that took place is in complete contradiction to Plaintiff's reasons for filing this motion which did not preserve the art work of which the opposite result occured. More important, once the recovery effort was under way it was distinctly communicated to Plaintiff's counsel that the art work was on a U-Haul, in a car and storage unit and would have been stolen and never recovered but not for the efforts that were enacted of (of which was to the benefit of Plaintiff) by the Defendant which took place during the week of September 20, 2016.

WHEREFORE, Defendant, respectfully requests that the Court find that Mr. Zoullas's had an good faith and objectively reasonable basis for removing this action, he merely failed to meet his burden of establishing jurisdiction. Therefore, attorney's fees and costs are unwarranted.

Dated: October 21, 2016
New York, New York

Respectfully submitted,

_/s/ Thomas A. Farinella____
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